

FILED	RECEIVED
ENTERED	SERVED ON
COUNSEL/PARTIES OF RECORD	
MAY 13 2016	
CLERK US DISTRICT COURT	
DISTRICT OF NEVADA	

UNITED STATES DISTRICT COURT

DEPUTY

DISTRICT OF NEVADA

Renard T. Polk,

Plaintiff,

v.

Robert Jones, et. al.,

Respondents.

Case No. 3:16-cv-00250-MMD-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Renard T. Polk, who is currently incarcerated within the Nevada Department of Corrections (NDOC) at Ely State Prison (ESP), has filed an application to proceed in forma pauperis (IFP). (ECF No. 1.) Polk has also filed what he describes as a consolidated motion to vacate, quash, annul, arrest, alter, amend and/or for relief from judgment. (ECF No. 1-1.) In effect, he challenges judgments entered in two cases he has filed within this district: 3:05-cv-00252-RCJ-VPC and 3:08-cv-00134-LRH-VPC. He references Federal Rules of Civil Procedure 50(a), 52(b), 59, 59(e), and 60. He names as respondents District Judges Robert Jones, Miranda Du, and Larry Hicks. (ECF No. 1-1 at 1.)

I. IFP APPLICATION

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that this provision applies to all actions filed in forma pauperis, not just prisoner actions).

1 In addition, the Local Rules of Practice for the District of Nevada provide: "Any person,
 2 who is unable to prepay the fees in a civil case, may apply to the Court for authority to proceed
 3 *in forma pauperis*. The application shall be made on the form provided by the Court and shall
 4 include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."
 5 LSR 1-1.

6 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
 7 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 8 (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir. 1960)). A litigant need not "be
 9 absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont De Nemours &*
 10 *Co.*, 335 U.S. 331, 339 (1948).

11 When a prisoner seeks to proceed without prepaying the filing fee:
 12 [I]n addition to filing the affidavit filed [as described above], [the prisoner] shall
 13 submit a certified copy of the trust fund account statement (or institutional
 14 equivalent) for the prisoner for the 6-month period immediately preceding the
 filing of the complaint or notice of appeal, obtained from the appropriate official
 of each prison at which the prisoner is or was confined.

15 28 U.S.C. § 1915(a)(2). Notwithstanding the foregoing:

16 [I]f a prisoner brings a civil action...*in forma pauperis*, the prisoner shall be
 17 required to pay the full amount of a filing fee. The court shall assess and, when
 18 funds exist, collect, as a partial payment of any court fees required by law, an
 19 initial partial filing fee of 20 percent of the greater of--
 20 (A) the average monthly deposits to the prisoner's account; or
 21 (B) the average monthly balance in the prisoner's account for the 6-month period
 immediately preceding the filing of the complaint or notice of appeal.
 22 (2) After payment of the initial partial filing fee, the prisoner shall be required to
 23 make monthly payments of 20 percent of the preceding month's income credited
 24 to the prisoner's account. The agency having custody of the prisoner shall forward
 25 payments from the prisoner's account to the clerk of the court each time the
 26 amount in the account exceeds \$10 until the filing fees are paid.

27 28 U.S.C. § 1915(b)(1), (2).

28 Polk's certified account statement indicates that his average monthly balance for the last
 six months is \$.01, and his average monthly deposits are \$16.67.

29 Polk's application to proceed *in forma pauperis* should be granted; however, Polk is
 30 required to pay a partial initial filing fee in the amount of \$3.33, and is required to pay the
 31 remainder of the filing fee over time pursuant to 28 U.S.C. § 1915.

32

II. SCREENING

A. Standard

28 U.S.C. § 1915 provides: "the court shall dismiss the case at any time if the court determines that...the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed in forma pauperis, whether or not the plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc); *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same standard under Section 1915(e)(2)(B) when reviewing the adequacy of the complaint or amended complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

In reviewing the complaint under this standard, the court must accept as true the allegations of the complaint, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe the pleadings in the light most favorable to plaintiff, and resolve all doubts in the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers, and must be liberally construed. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

A complaint must contain more than a "formulaic recitation of the elements of a cause of action," it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough

1 facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*,
2 556 U.S. 662, 678 (2009).

3 A dismissal should not be without leave to amend unless it is clear from the face of the
4 complaint that the action is frivolous and could not be amended to state a federal claim, or the
5 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
6 1103, 1106 (9th Cir. 1995) (dismissed as frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th
7 Cir. 1990).

8 **B. Motion**

9 Initially, it is noted that Polk names District Judges Jones, Hicks and Du as respondents
10 in this matter, presumably because they were assigned to the cases for which Polk seeks to set
11 aside judgments; however, Polk's filing does not include a discussion of a case involving District
12 Judge Du. Therefore, there is no issue with District Judge Du addressing this Report and
13 Recommendation. In addition, it was District Judge McKibben and not District Judge Jones that
14 granted the motion to dismiss Polk's federal habeas petition. (3:05-cv-00252-RCJ-VPC, ECF
15 No. 29.) Moreover, in an action for relief from judgment, the defendant(s) should be the
16 defendant(s) in the underlying action and not the district judges assigned to the action.

17 With respect to 3:05-cv-00252-RCJ-VPC, a federal habeas action, Polk states that Judge
18 Jones initially ordered the defendants to forego filing a motion to dismiss, but later permitted the
19 filing of such a motion. (ECF No. 1-1 at 2.) He claims that the judge presumed the Nevada
20 Supreme Court's decision denying State post-conviction relief was correct. (*Id.* at 2-3.) He
21 recounts that on July 4, 2004, and thereafter, the Eighth Judicial District Court in Clark County,
22 Nevada, scheduled a hearing for habeas relief which he contends would have entitled him to
23 relief and release. (*Id.* at 3.) He states that he tried to secure his presence at the hearing by filing
24 prison grievances and motions for transport, to no avail. (*Id.*) He goes on to assert that the court
25 proceeded to decision without him in excess of its jurisdiction. (*Id.*) He appealed the decision to
26 the Nevada Supreme Court, which found the issues waived and affirmed the lower court's order.
27 (*Id.* at 3-4.) He claims that Judge Jones's decision to dismiss the petition was likewise contrary to
28 federal law. (*Id.*)

1 With respect to Case 3:08-cv-00134-LRH-VPC, Polk asserts that Judge Hicks improperly
2 assumed facts not in evidence and issued decisions without authority. (ECF No. 1-1 at 7-8.)

3 Insofar as Polk references Rule 50(a)(2), that rule provides that a motion for judgment as
4 a matter of law, and such a motion must be made before the case is submitted to the jury. Polk's
5 motion is untimely as to both of the cases referenced as this motion has been filed years after
6 judgment has been entered in both cases.

7 Polk next references Rule 52(b), which permits the court to amend its findings of fact and
8 conclusions of law or the judgment on motion of a party filed "no later than 28 days after the
9 entry of judgment." A motion under Rule 52(b) is likewise untimely.

10 Rule 59 governs motions for new trial or motions to alter or amend a judgment. A motion
11 for new trial or to alter or amend a judgment must also be filed "no later than 28 days after the
12 entry of judgment." Fed. R. Civ. P. 59(b), (e). A motion under Rule 59 is likewise untimely with
13 respect to both of these cases.

14 Rule 60(a) permits the court to correct a clerical mistake or mistake arising from
15 oversight in judgment, but "after an appeal has been docketed in the appellate court and while it
16 is pending, such a mistake may be corrected only with the appellate court's leave." Fed. R. Civ.
17 P. 60(a). Polk filed an appeal in case 3:08-cv-00134-LRH-VPC, and Judge Hicks was affirmed.
18 (3:08-cv-00134-LRH-VPC, ECF Nos. 35-37.) Therefore, the court may not take any action under
19 Rule 60(a). Polk also filed an appeal in case 3:05-cv-00252-RCJ-VPC (ECF No. 45), which
20 likewise precludes the court from taking action under Rule 60(a).

21 A party may also seek relief from final judgment under Rule 60(b), but such a motion
22 must be made "no more than a year after the entry of judgment or order or the date of the
23 proceeding." Fed. R. Civ. P. 60(c)(1). A motion made under Rule 60(b) is also untimely with
24 respect to both of the underlying actions.

25 Finally, while not specifically referenced by Polk, a party may file an independent action
26 to seek relief from judgment. *See U.S. v. Beggerly*, 524 U.S. 38, 118 S.Ct. 1862, 141 L.Ed.2d 32
27 (1998). Such an action is permitted only in exceptional circumstances to prevent grave
28

1 miscarriages of justice such as a fraud on the court. *See id.* The court finds that such
2 circumstances are not present here.

3 With respect to case 3:08-cv-00134-LRH-VPC, Polk asserts that Judge Hicks exceeded
4 his authority in issuing his orders. The undersigned disagrees. Polk filed a civil rights complaint
5 under 42 U.S.C. § 1983, which Judge Hicks screened pursuant to his authority under 28 U.S.C. §
6 1915A. (*See* 3:08-cv-00134-LRH-VPC, ECF No. 8.) Judge Hicks then dismissed the remaining
7 defendant and claims against him without prejudice because Polk failed to timely serve him with
8 the summons and complaint pursuant to Federal Rule of Civil Procedure 4(m). (3:08-cv-00134-
9 LRH-VPC, ECF No. 24.) The Ninth Circuit subsequently affirmed Judge Hicks. (3:08-cv-00134-
10 LRH-VPC, ECF No. 37.) Accordingly, there is no basis to maintain an independent action for
11 relief from judgment as to this action.

12 With respect to case 3:05-cv-00252-RCJ-VPC, Polk filed an amended federal petition for
13 writ of habeas corpus pursuant to 28 U.S.C. § 2254. (3:05-cv-00252-RCJ-VPC, ECF No. 12-
14 2778436.) A motion to dismiss the amended petition was filed. (3:05-cv-00252-RCJ-VPC, ECF
15 No. 18-2789104.) The motion to dismiss was granted. (3:05-cv-00252-RCJ-VPC, ECF No. 29.)

16 Polk now claims that the judgment in 3:05-cv-00252-RCJ-VPC should be vacated
17 because he was improperly prohibited from attending the hearing on his State habeas petition,
18 which rendered void the court's action denying his habeas petition as well as the Nevada
19 Supreme Court's subsequent order affirming the order. As a result, he likewise contends that the
20 order denying him federal habeas relief should also be vacated.

21 First, Polk failed to raise this argument in his federal petition even though he would have
22 known about it at that time. Notably, he did not raise it in his appeal of the State habeas petition.
23 Polk is essentially trying to raise a ground for federal habeas relief that was not raised in his prior
24 petition. 28 U.S.C. § 2244(3)(A) provides: "Before a second or successive application permitted
25 by this section is filed in the district court, the applicant shall move in the appropriate court of
26 appeals for an order authorizing the district court to consider the application." Polk has not
27 obtained leave of court from the Ninth Circuit to file a successive petition. Therefore, the court
28 cannot consider this argument or afford Polk the relief he seeks.

1 Second, Polk's argument is unconvincing because the State habeas petition was fully
 2 briefed and the State district court concluded an evidentiary hearing was not warranted. (3:05-cv-
 3 00252-RCJ-VPC, ECF No. 19-2789105 at 189.) The Nevada Supreme Court likewise concluded
 4 that Polk was not entitled to relief on his petition, and that briefing and oral argument were
 5 unwarranted. (3:05-cv-00252-RCJ-VPC, ECF No. 19-2789105 at 237.)

6 In sum, Polk has not presented circumstances rising to the level of a miscarriage of
 7 justice sufficient to maintain an independent action for relief from judgment.

8 For these reasons, it is recommended that this action be dismissed with prejudice.

9 **III. RECOMMENDATION**

10 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order:

11 **(1) GRANTING** Polk's IFP application (ECF No. 1); however, pursuant to 28 U.S.C.
 12 § 1915(b), he is still required to pay the full amount of the filing fee over time. Within thirty days
 13 of the date of any order adopting and accepting this report and recommendation, Polk should be
 14 required to pay an initial partial filing fee of \$3.33. Thereafter, Polk should be required to make
 15 monthly payments of twenty percent of the preceding month's income credited to his account to
 16 be forwarded by the agency having custody over Polk to the Clerk of this court each time the
 17 amount in Polk's account exceeds \$10 until the filing fee is paid.

18 **(2) Directing the Clerk to FILE the motion (ECF No. 1-1); and DISMISSING the action
 19 WITH PREJUDICE.** Polk should be advised:

20 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
 21 this Report and Recommendation within fourteen days of receipt. These objections should be
 22 titled "Objections to Magistrate Judge's Report and Recommendation" and should be
 23 accompanied by points and authorities for consideration by the district judge.

24 2. That this Report and Recommendation is not an appealable order and that any notice of
 25 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
 26 until entry of judgment by the district court.

27 DATED: May 13, 2016.

WILLIAM G. COBB
 WILLIAM G. COBB
 UNITED STATES MAGISTRATE JUDGE